



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 14, 2012

Mr. James R. Evans, Jr.  
Counsel for the Polk Central Appraisal District  
Hargrove & Evans, L.L.P.  
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Austin, Texas 78735

OR2012-07092

Dear Mr. Evans:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 453468.

The Polk Central Appraisal District (the "district"), which you represent, received a request for the file of "PID: 35406, GEO ID: F0680-0031-00" involving specified property owners, the appraisal review board file pertaining to the protest of the property owners, specified audio and video recordings, and the requestor's personnel file. You state the district does not have any information responsive to the request for specified audio or video recordings.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and

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<sup>1</sup>We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

<sup>2</sup>Although you raise section 552.022 of the Government Code, we note this section is not an exception to public disclosure under the Act. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See* Gov't Code § 552.022. Further, although you raise sections 552.108 and 552.149 of the Government Code, you make no arguments to support these exceptions. Therefore, we assume you have withdrawn your claim these sections apply to the submitted information.

reviewed the submitted information. Additionally, you state release of the submitted information may implicate the interests of the previous and current property owners. Accordingly, you inform us you notified the previous and current property owners of the request and of their right to submit comments to this office as to why the requested information should not be released to the requestor. *See Gov't Code § 552.304* (providing that any person may submit comments stating why information should or should not be released).

We note the requestor has excluded social security numbers and driver's license numbers from her request. Thus, the submitted social security numbers and driver's license numbers are not responsive to the instant request. The district need not release nonresponsive information in response to this request, and this ruling will not address that information.<sup>3</sup>

Next, we note some of the submitted information consists of completed appraisal reports made by the district, which are subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]" *Id.* § 552.022(a)(1). Pursuant to section 552.022(a)(1), a completed report is expressly public unless it is either excepted under 552.108 of the Government Code or is made confidential under the Act or other law. Although you raise section 552.103 of the Government Code, section 552.103 is a discretionary exception to disclosure and does not make information confidential under the Act. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 does not make information confidential for the purposes of section 552.022. Therefore, the district may not withhold the completed reports, which we have marked, under section 552.103 of the Government Code.

We next address your argument under section 552.103 of the Government Code for the information not subject to section 552.022(a)(1). Section 552.103 provides in relevant part as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

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<sup>3</sup>As we are able to make this determination, we need not address your argument under section 552.101 of the Government Code in conjunction with section 11.48 of the Tax Code.

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(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. *See id.* § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). We note contested cases conducted under the Administration Procedure Act (the “APA”), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991). We further note a contested case before the State Office of Administrative Hearings (the “SOAH”) is considered litigation for the purposes of the APA. *See id.*

To establish litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>4</sup> *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps

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<sup>4</sup>In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You contend the district anticipates litigation because the Texas Department of Licensing and Regulation (“TDLR”) issued a Notice of Alleged Violation against a district employee. You assert the notice, which you have submitted, “clearly involves the [d]istrict because the statements contained in the [n]otice go to alleged conduct by [d]istrict personnel in connection with the [d]istrict’s appraisal of the property [at issue]” and “could implicate the district to the extent that the [n]otice alleges that an incorrect value was placed on the property by the [d]istrict.” You explain a proceeding by TDLR to impose an administrative penalty is considered a contested case under the APA. *See* Occ. Code § 51.310(b). However, we note the notice was issued against the district employee, not the district. You have not explained how the district will be a party to the anticipated contested case. *See* Gov’t Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). Accordingly, we find the district has failed to demonstrate litigation was reasonably anticipated or pending when the district received the request for information. Thus, the district may not withhold any of the information not subject to section 552.022(a)(1) under section 552.103 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information made confidential by other statutes, such as section 22.27 of the Tax Code, which states, in pertinent part:

(a) Rendition statements, real and personal property reports, attachments to those statements and reports, and other information the owner of property provides to the appraisal office in connection with the appraisal of the property, including income and expense information related to a property filed with an appraisal office and information voluntarily disclosed to an appraisal office or the comptroller about real or personal property sales prices after a promise it will be held confidential, are confidential and not open to public inspection. The statements and reports and the information they contain about specific real or personal property or a specific real or personal property owner and information voluntarily disclosed to an appraisal office about real or personal property sales prices after a promise it will be held confidential may not be disclosed to anyone other than an employee of the appraisal office who appraises property except as authorized by Subsection (b) of this section.

Tax Code § 22.27(a). We understand the district is an appraisal office for purposes of section 22.27 of the Tax Code. You state the information you have marked was provided to

the district by the property owners in connection with an appraisal and under a promise of confidentiality. You do not inform us, and it does not otherwise appear, any of the exceptions in section 22.27(b) apply in this instance. *See id.* § 22.27(b). Based on your representations and our review, we find the information you have marked is confidential and must be withheld under section 552.101 of the Government Code in conjunction with section 22.27(a) of the Tax Code.<sup>5</sup>

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). Upon review, we find the information you have marked is either not intimate or embarrassing or is of legitimate public concern. Therefore, the district may not withhold any portion of the information it has marked under section 552.101 in conjunction with common-law privacy.

Section 552.101 also encompasses the constitutional right to privacy. Constitutional privacy protects two kinds of interests. *See Whalen v. Roe*, 429 U.S.589,599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the “zones of privacy,” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir.1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in the information. *See* ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). In this instance, you have not demonstrated how constitutional privacy applies to the information you have marked. Consequently, the district may not withhold the information you have marked under section 552.101 in conjunction with constitutional privacy.

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<sup>5</sup>As our ruling on this information is dispositive, we need not address your remaining arguments against its disclosure.

We note some of the remaining information is subject to sections 552.130, 552.136, and 552.139 of the Government Code.<sup>6</sup> Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's license or driver's license or a motor vehicle title or registration issued by a Texas agency, or an agency of another state or country. *See Gov't Code* § 552.130(a)(1)-(2). Upon review, we find the district must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code states “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136. Accordingly, we find the district must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code.

Section 552.139(b)(3) of the Government Code provides “a photocopy or other copy of an identification badge issued to an official or employee of a governmental body” is confidential. *Id.* § 552.139(b)(3). The remaining information contains photocopies of the requestor's identification badges. Thus, the district must withhold this information, which we have marked, under section 552.139(b)(3).

In summary, the information you have marked is confidential and must be withheld under section 552.101 of the Government Code in conjunction with section 22.27(a) of the Tax Code. The district must withhold the information we have marked under sections 552.130, 552.136, and 552.139 of the Government Code. The remaining information must be released to this requestor.<sup>7</sup>

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

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<sup>6</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>7</sup>Because the requestor has a right of access to certain information that otherwise would be excepted from release under the Act, the district must again seek a decision from this office if it receives a request for this information from a different requestor.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Jennifer Luttrall". The signature is written in a cursive style with a large initial "J".

Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/som

Ref: ID# 453468

Enc. Submitted documents

c: Requestor  
(w/o enclosures)